United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1422

To be argued by
EDWARD PANZER

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

JOSEPH MESSINA,

Appellant.

B/S

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Table of Citations

Table of Citations (cont'd.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. JOSEPH MESSINA, Appellant.	Docket No.: 76-1422

STATEMENT PURSUANT TO RULE 23(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered September 20, 1976 in the United States District Court for the Southern District (Pollack, J.), convicting Appellant Messina after a plea of guilty of violating Title 18 U.S.C. §1955 by engaging in an illegal gambling business. Appellant was sentenced to a term of imprisonment for a period of two years; said sentence was ordered suspended with the exception of a two month period; and at the conclusion of said two month term, appellant was ordered placed on probation for a three year term, and fined $2,000.

Appellant has been granted a stay pending the appeal of the appeal of the above judgment of conviction.

QUESTION PRESENTED

1. Whether this Court should reverse its prior holdings that appellant possessed the requisite standing to suppress evidence which was tainted as a result of the illegal state wire taps.

STATEMENT OF FACTS

Appellant Messina was indicated along with ten other co-defendants, and charged in a two-count indictment with the following crimes: conspiracy to violate Title 18 U.S.C. §1955 in that it was alleged that the defendants conducted an illegal gambling business, to wit, a sports betting and mutuel race horse policy business, and the substantive crime as well.

On June 22, 1976, a hearing was held before the Hon. Milton Pollack pursaunt to the defendants' motions to suppress the fruits of eight state and three federal wiretap orders on the ground that the state tapes were not sealed "immediately" upon the termination of the

taps, and that the federal taps were derived from the state taps, thus tainting the evidence seized as a result of the federal tap. The defendants raised the additional claim that the affidavits submitted by an F.B.I. agent as part of the government s application for the three federal taps were insufficient to authorize the use of wiretaps as an investigative technique, and that other traditional means should have been employed.

The following is a chronological listing of the eavesdropping orders, specifying the date of issuance, the date terminated, and the date sealed:

(i) The Crescent wiretap issued by Judge Tyler on February 7, 1973, was terminated on February 22, 1973 and was sealed on January 7, 1974.

(ii) The Blackman wiretap issued by Justice Roberts on September 18, 1973 was sealed on October 18, 1973.

(iii) The Whalen wiretap issued by Justice Sullivan on October 26, 1973, was terminated on November 25, 1973 and sealed on January 7, 1974.

(iv) The Whalen II wiretap issued by Justice Bloom on November 12, 1973, was terminated on November 25, 1973, and sealed on January 7, 1974.

(v) The Salome wiretap issued by Justice Bloom on November 28, 1973 was terminated on December 18, 1973, and sealed on January 11 1974.

(vi) The Social Club wiretap was issued by Justice Bernstein on January 5, 1974, terminated on January 8, 1974, and sealed on February 1, 1974.

(vii) The G&D wiretap issued by Justice Bernstein on January 5, 1974 was terminated on February 7, 1974 and sealed on March 21, 1974.

(viii) The Vaccarelli wiretap issued by Justice Channanau on April 22, 1974, was terminated on May 21, 1974, and sealed on May 23, 1974.

(ix) The Faranda wiretap issued by Justice Hughes on June 11, 1974, terminated on June 30,1974 and was sealed on July 1, 1974.

(x) The Expresso wiretap issued by Judge Ward on July 11, 1974 was terminated on July 30, 1974, and sealed on July 31, 1974.

(xi) The Rosewood wiretap issued by Judge Owen on August 15, 1974, terminated on September 9, 1974, and was sealed on September 10, 1974.

(xii) The Rosewood renewal tap issued by Judge Motley on September 24, 1974 terminated on October 13, 1974 and was sealed on October 23, 1974.

At the outset of the hearing the court ascertained from the Government that only four of the taps, the Social Club, the G&D, the Vacarrelli and Faranda taps, involved interception of any of the defendants (8-9). The court also noted that there was only a complaint of late sealing of the [illegible] wiretap which was terminated on February 24, 1974 and sealed on March 21st and the Social Club tap (Battista tap), which was terminated on January 8th and sealed on February 1st (10). It was the Government's position that the only defendants who could complain of the late sealing were Faranda, Dituri and D'Addario, since they were the only parties intercepted on these taps (10). When the court then questioned whether under existing federal law, the remaining defendants even had standing to contest the legality of the wiretaps, counsel pointed out that if New York State law was applied, the defendants would have standing (16).

The Government in turn asserted that it was their position that even if there were a disparity in state law regarding standing, such a fact would nevertheless be irrelevant, since the New York sealing requirement is not one that carries a taint into the subsequent tap (17).

In specific response to appellant's counsel's query, the court stated that it was holding that even if there were an issue regarding late sealing, the only defendants who had standing to contest this issue were those who were actually intercepted, the targets, or the owners of the property wherein the taps were placed (25).

Thereafter, in a written opinion dated July 1, 1976, Judge Pollack ruled that appellant Messina had no standing to contest the legality of the taps. In view of this ruling and in order to avoid duplicity of issues, Messina in this brief will address himself only to the standing issue, and will rely on the briefs of the other appellants as to any remaining issue.

ARGUMENT

POINT I

THIS COURT SHOULD REVERSE ITS PRIOR HOLDINGS AND FIND THAT APPELLANT POSSESSED THE REQUISITE STANDING TO SUPPRESS EVIDENCE WHICH WAS TAINTED AS A RESULT OF THE ILLEGAL STATE WIRETAPS.

It is recognized that the rule is firmly entrenched in this Court that a defendant, in order to challenge the legality of a wiretap, must be deemed an "aggrieved person" in that he must be a party to the intercepted communication, or one against whom the interception was directed. United States v. Wright, 524 F.2d 1100 (2d Cir. 1975); United States v. Bynum, 513 F.2d 533 (2d Cir. 1975). It is submitted that the antiquated notion of standing, resting upon a personal interest in the premises searched or property seized, is no longer tenable in light of Mapp v. Ohio, 367 U.S. 643 (1961) and its progeny.

Since Mapp, it has become patently clear that the purpose of the Fourth Amendment based exclusionary rule is deterrence of illicit police activity. Each time illegally seized property is excluded as evidence, the purpose of the rule is effectuated. On every occasion that such property is admitted because of a purported lack of standing, the rationale behind the rule is undermined. See Elkins v. United States, 364 U.S. 206 at p. 217. This Court should

therefore hold that Appellant Messina had standing to suppress any illegally tainted wiretaps because only by such a decision will the purpose underlying the Fourth Amendment be implemented.

There is no question but that the procedural device of standing has been used in a manner that will encourage - if not sanction - wiretaps purposely conducted in contravention of the Fourth Amendment, and various state laws.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be literally construed. Boyd v. United States, 116 U.S. 616 p. 635 (1885)

Standing should not be viewed as a procedural device simply designed to require appellant to demonstrate an interest in the interceptions seized or the property from which the seizure took place. In short, standing must not be used as a procedural tool to undercut the policy objectives which the substantive, constitutional doctrine is intended to promote.

We therefore urge this Court to disavow rules of standing not compatible with the tenor of the Fourth Amendment doctrine. As a defendant in a criminal proceeding, Messina should be allowed to object to the introduction of illegal wiretaps, although his voice was not specifically intercepted, or he has not shown any interest in the property from where the taps emanated. By guaranteeing Messina's right to suppress these illegal wiretaps, this Court would be expressing its official disapproval of unconstitutional seizures - no matter who they may be directed against - and implementing the philosophy of deterrence underpinning the Fourth Amendment.

POINT II

PURSUANT TO THE RULES OF THIS COURT, APPELLANT ADOPTS ALL RELEVANT ARGUMENTS OF HIS CO-DEFENDANTS.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT BELOW SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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FEDERAL COURT
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

JOSEPH MESSINA,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 22nd *day of* Dec. *19* 76 *at* 1 St. Andrews Plaza
New York, N.Y.
10007

deponent served the annexed Appellant Brief *upon*

U.S. Attorney-Southern District
Mr. Robert Fiske Jr.

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 22nd
day of December, *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
NO. 41-4623150
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer